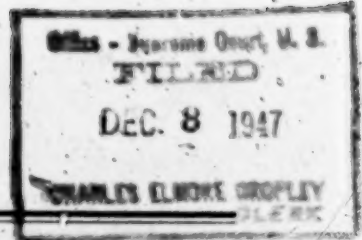


FILE COPY

No. 215



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1947

**IN THE MATTER OF WILLIAM OLIVER,
PETITIONER.**

**ON CERTIORARI TO THE SUPREME COURT OF
THE STATE OF MICHIGAN**

BRIEF FOR THE STATE OF MICHIGAN

**Eugene F. Black
Attorney General of the
State of Michigan**

**Edmund E. Shepherd
Solicitor General of the
State of Michigan**

**H. H. Warner
Daniel J. O'Hara
Assistants Attorney General
Counsel for Respondent
State of Michigan**

Index of Matter in the Brief

	Page
I Opinions Below	1
II Jurisdiction	2
III Concise Statement of the Case	2
IV Questions Presented	11
V Summary of the Argument	12
VI The Argument	
Point One: Petitioner was not denied due process of law when summarily convicted of contempt before a judge acting in chambers as a one-man grand jury.....	16
Point Two: It is not a denial of due process to convict a witness of contempt of court summarily and with- out trial, for giving evasive answers to pertinent questions in the immediate presence of a Michigan circuit judge acting as a one-man grand jury.....	22
VII Conclusion	28

APPENDIXES

Appendix 'A'—Summary of Michigan's criminal pro- cedure under her 'one-man grand jury system', its history and purposes.....	29
--	----

Table of the Cases

	Page
Adamson v. California, 67 S. Ct. 1672	
Appel Ads. United States, 211 F. 495	14, 23, 25
Chase Securities Corp. v. Donaldson, 325 U.S. 304	13
Clark v. United States, 289 U.S. 1	14, 25
Cohen, In re, 295 Mich. 743	10, 36
Cooke v. United States, 267 U.S. 517	20
Creasy v. Hall, 243 No. 679, 148 S.W. 914	15
D. & M. Railway Co. v. Fletcher Paper Co., 284 U.S. 30	13
Eskay, 38 F. Supp. 211, affirmed, 122 F. 2d 819	15
Gibson v. Martin, 308 Mich. 178	8
Hartley, In re, 317 Mich. 441	1, 6, 9
Hudgins, Ex Parte, 249 U.S. 379	14, 24
In re (see name of party)	
Kaplan Bros., 213 F. 753	24
Loubriel v. United States, 9 F. 2d 807	24
Michael, In re, 326 U.S. 224	14, 20, 24, 25
Mundy v. McDonald, 216 Mich. 44	10, 12
Nye v. United States, 313 U.S. 33	14, 20

	Page
Oatman v. Port Huron Chief of Police, 310 Mich. 57.....	8
O'Connell v. United States, 40 F. (2) 201.....	24
Oliver, In re 318 Mich. 7.....	16
People v. Bartlett, 312 Mich. 648.....	39
People v. Butler, 221 Mich. 626.....	37
People ex rel. Roach v. Carter, 297 Mich. 577.....	38
People v. Delano, 318 Mich. 557.....	5, 39
People v. Doe, 226 Mich. 5.....	3, 12
People v. Heidt, 312 Mich. 629.....	39
People v. Hoffa, 318 Mich. 656.....	4
People v. McCrea, 303 Mich. 213.....	5, 33, 38
People v. Norwood, 312 Mich. 266.....	36
People v. O'Hara, 278 Mich. 281.....	38
People v. Reading, 307 Mich. 616.....	36, 38
People v. Roxborough, 307 Mich. 575.....	38
People v. Ryan, 307 Mich. 610.....	38
People v. Tenerowicz, 277 Mich. 276.....	37
People v. Wilcox, 303 Mich. 287.....	38
People v. Woodson, 309 Mich. 591.....	36

	Page
Petition for Investigation of Recount, In re 270: Mich. 328	3, 38
Savin, In re 131 U.S. 267	20, 21
Schnitzer, In re 295 Mich. 736	13, 36
Schulman, In re 177 F. 191	15, 24
Slattery, In re 310 Mich. 458, cert. den. 325 U.S. 876	3, 4, 6, 10, 11, 12, 13, 14, 16
Slattery v. McDonald, 151 F. (2) 326	4, 13, 17
United States v. Appel, 211 F. 495	14, 23, 25
Ward, In re 295 Mich. 742	36
Watson, In re 293 Mich. 263	13, 36
Wilkowski, In re 270 Mich. 678	13, 36

Statutes Cited

	Page
Mich. Code of Crim. Pro., ch. 7, Secs. 3-6 incl., Michigan Comp. Laws 1929, Secs. 17217-17220, Mich. Stat. Ann. Sec. 28.943-28.946 (being Michigan's one-man grand jury law)	1, 3, 4, 11, 19, 31, 33, 35, 36
The Judicature Act, Ch. 5, Sec. 1 et seq., esp. Secs. 1 and 2, Comp. Laws 1929, Secs. 13910, 13911, Stat. Ann. Secs. 27.511, 27.512	18, 19, 20, 21
Act 284, Pub. Acts Mich. 1931	32
Judicial Code, U.S., Sec. 237	2
Judicial Code, U.S., Sec. 268	25, 26
Mich. Const. 1835, Art. 1, Sec. 11	31, 32
Mich. Const. 1850, Art. 6, Sec. 28	31, 32
Mich. Const. 1908, Art. 2, Sec. 19	31, 32

Text Books Cited

	Page
Gillespie, Michigan Criminal Law & Pro., Vol. 1, Sec. 99, pp. 101-102	32
Michigan State Bar Journal, Sept. 1947, pp. 55-62, at p. 58	33
Michigan State Bar Journal, Nov. 1947, p. 32	6
Twenty-sixth Annual Report, Michigan State Bar Association, 1916, pp. 101-115	34

No. 215

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1947

IN THE MATTER OF WILLIAM OLIVER,
PETITIONER.

ON CERTIORARI TO THE SUPREME COURT OF
THE STATE OF MICHIGAN

BRIEF FOR THE STATE OF MICHIGAN

I

Opinions Below

The opinions delivered in the court below are officially reported: *In re Oliver*, 318 Mich. 7

Opinions delivered in the court below in an earlier and correlated case that presented identical questions, are officially reported: *In re Hartley*, 317 Mich. 441. [1]

[1]

In each case the opinions of an equally divided court resulted in an order dismissing writs of habeas corpus and ancillary certiorari, and in affirming a summary conviction of contempt of court committed by a witness when testifying before a Michigan circuit judge acting as a one-man grand jury pursuant to the Michigan Code of Criminal Procedure, chapter 7, § § 3-6, incl., Mich. Comp. Laws 1929, § § 17217-17220, Mich. Stat. Ann. § § 28.943-28.946.

II

Jurisdiction

In our brief opposing the petition for certiorari, we suggested a few reasons for doubting jurisdiction under § 237 (b) of the Judicial Code, 28 U.S.C. § 344 (b), but since the Court has granted the writ, we assume the question is foreclosed.

III

Concise Statement of the Case[2]

Since counsel has informed us he will probably stand on his brief in support of the petition for certiorari, we make such statement as we deem necessary to correct the following insufficiencies and inaccuracies therein:[3]

1. Counsel states, p. 7, that 'a Michigan statute constitutes a circuit judge an Inquisitor with powers similar to a grand jury', and he has dubbed this law, pp. 14-16, the 'Michigan Inquisitorial Statute'. [4]

[2]

When this brief was written we had not yet received copies of the printed transcript of the record; therefore, unless otherwise plainly indicated, numbers in parentheses refer to pages of the original printed record.

[3]

Supreme Court Rule 27 (4).

[4]

The opponents of Michigan's one-man grand jury system, refer to the proceedings as an 'Inquisition' and to the one-man grand jury as the 'Inquisitor', using such terms in their medieval sense, but we must assume that counsel employs them as commonly understood.

Since that 'statute' as applied and construed by Michigan's highest judicial authority, [5] is the focal point of this controversy, it is considered essential to a plain understanding of the question involved, [6] that these four sections of Michigan's code of criminal procedure be clearly explained.

Section 3 of chapter 7 of the Michigan Code of Criminal Procedure, [7] authorizes a circuit judge 'whenever . . . (he) shall have probable cause to suspect that any crime . . . shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense', to 'require such person to attend before him as a witness and answer such questions as such . . . judge may require concerning any violation of law about which he may be questioned'. [8]

[5]

This law has been interpreted, construed and applied by the Michigan Supreme Court on numerous occasions, inter alia: *People v. Doe*, 226 Mich. 5; *In re Petition for Investigation of Recount*, 270 Mich. 328; *In re Slattery*, 310 Mich. 458; certiorari denied, 325 U. S. 876.

[6]

The federal question in essence is whether a circuit judge denies due process in summarily adjudging a witness guilty of contempt because he has given evasive testimony during a one-man grand jury inquiry.

[7]

Mich. Comp. Laws 1929 § 17217; Mich. Stat. Ann. § 28.943.

[8]

It is then provided, *id.* § 4, as amended by Act No. 33, Pub. Acts 1947, that if upon such inquiry the judge 'shall be satisfied that any offense has been committed, and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process'. The 1947 amendment did not change this language, but added a proviso that such judge is disqualified from acting thereafter in the matter.

Section 5 thereof^[9] provides in part:

"Sec. 5. Any witness neglecting or *refusing*
to answer any questions which such . . . judge may re-
quire material to such inquiry, shall be deemed guilty
of a contempt". . .^[10]

And section 6,^[10a] recognizing the State constitutional guaranty of privilege against self-incrimination,^[10b] provides that no witness shall be required to answer any questions the answers to which might tend to incriminate him unless under the formula therein prescribed,^[10c] he is first granted immunity.^[11]

[9]

Mich. Comp. Laws 1929 § 17219, Mich. Stat. Ann. § 28.945.

[10]

The italicized words 'refusing to answer any questions' has been judicially construed to include an evasive answer as tantamount to a refusal to answer. In re Slattery, 310 Mich. 458, certiorari denied, 325 U.S. 876. See Slattery v. MacDonald, 151 F. 2d 326, certiorari denied, 326 U.S. 787, rehearing denied, 327 U.S. 814.

[10a]

Mich. Comp. Laws 1929 § 17220, Mich. Stat. Ann. § 28.946.

[10b]

Mich. State Const. 1908, article 2, § 16.

[10c]

Such formula reads: Sec. 6. No witness shall . . . be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted by such judge, and any such questions and answers shall be reduced to writing and entered upon the journal of such judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense which such answers may have tended to incriminate him'.

[11]

Under a recent decision of the Michigan Supreme Court, *People v. Hoffa*, In re Prujansky, 318 Mich. 656, this section protects a witness whose testimony before a one-man grand jury might tend to incriminate him in a federal court.

For the further information of the Court we publish as Appendix A, *post*, pp. 29-40, a summary of Michigan's criminal procedure under her one-man grand jury law, relating something of its history, [12] and stating the main purposes for which it has been utilized.[12a]

We deem it important to add that in 1947 a special committee of 15 members appointed by the Michigan State Bar (an organization of all practicing attorneys not to be confused with the Lawyers Guild in whose behalf a brief *amicus curiae* will probably be filed)[13] to study and report upon the Michigan one-man grand jury law, recommended *inter alia* that such law 'should, with certain appropriate amendments, remain a part of the system of criminal jurisprudence of the state of Michigan'. [14] This majority report was signed by 12 members of the committee, while three members signed a minority report. The majority report was

[12]

From this it will be seen that the Michigan one-man grand jury law, originally enacted as Act No. 196, Pub. Acts 1917, was passed by the legislature on recommendation of a special committee of the Michigan Bar Association.

[12a]

In general this law is used for the discovery of widespread criminal conspiracies involving public officials who have proved recreant to their trust. *People v. McCrea*, 303 Mich. 213; *People v. Delano*, 318 Mich. 557.

[13]

The Michigan State Bar, of which every practicing lawyer in the state is required by law to belong and to sustain, was created by Act No. 58, Pub. Acts 1935; Mich. Stat. Ann. § 27.101 et seq.

[14]

This report, together with that of the minority, is published in the September 1947 issue of the Michigan State Bar Journal, p. 55 et seq., available in the Library of the Supreme Court of the United States.

adopted at the annual meeting of the Michigan State Bar in 1947.[15] It will we hope prove informative.

2. In the petition for certiorari, p. 5, there is an off-the-record reference to scores of Michigan citizens who, it is said, 'have been summarily convicted of contempt of court, even though they have never been before a court, by judges acting as one-man grand juries'; and in the brief that follows, counsel state, p. 7, '*At no time, however, was he ever in the presence of a court*' (the italics are those of counsel).

Counsel is mistaken for it is now established Michigan doctrine that a circuit judge who by virtue of the foregoing provisions of the State Code of Criminal Procedure conducts a one-man grand jury inquiry 'is acting in a judicial capacity'. [16]

3. It is insufficient to say, as counsel states, p. 7, that the circuit judges 'deemed his (petitioner's) testimony *untruthful*', for the judge who acted as a one-man grand jury also considered such testimony '*evasive*' (9), and the prevailing opinion in *Oliver*, 318 Mich. at 14, as well as the prevailing opinion in *Hartley*, 317 Mich. at 448-451, emphasized the '*evasive*' rather than the '*untruthful*' character of the answers of each witness.

4. Counsel also states, p. 7, that petitioner having been given 'into the custody of the sheriff', 'He was then denied

[15]

Michigan State Bar Journal, November 1947 issue, p. 32.

[16]

In the case of *Slaterry*, the Michigan Supreme Court, after citing about 11 of its decisions involving one-man grand jury proceedings, said: 'So that there may be no further question, we hold that the judge conducting a one-man grand jury proceeding is acting in a judicial capacity'. In re *Slaterry*, 310 Mich. 458, at 467; certiorari denied, 325 U.S. 878.

the right to consult counsel' (3). But this claim of denial of counsel apparently was not urged in the court below; it is not mentioned in the opinions; and it does not appear among the reasons assigned for allowance of the writ of certiorari, pp. 5-6; nor is the question of denial of counsel raised in petitioner's brief.

5. Finally it is said, p. 7, that petitioner was questioned by the circuit judges in secret chambers^[17] 'as to the purchase and disposal of certain bonds', but this over-simplifies the matter.

The facts as set forth (8-15) in the circuit judge's return to the ancillary writ of certiorari issued by the court below, are correctly summarized (22-26) in the prevailing opinion in the court below, 318 Mich. 9-12:

"The return sets forth that, in the course of the investigation referred to,^[18] it was called to the attention of the circuit judge, acting as a grand juror, that plaintiff (Oliver) was the owner of certain pin ball machines which were being operated in Oakland county, and which, it was suspected, were being used for gambling

[17]

It is, of course, no novelty to conduct a grand jury proceeding in secret.

[18]

The investigation conducted by the one-man grand jury involved (22) 'alleged violations of the statutes of the State pertaining to gambling, operation of gambling devices, bribery of public officials, and other offenses' (8).

purposes;[19] and that plaintiff had purchased from one C. A. Mitchell, doing business as the Midwest Bonding Company, a series of instruments referred to as 'bonds', for which plaintiff had paid certain sums of money. The return further shows that Oliver was questioned before the grand jury concerning his dealings with Mitchell, and also as to the location of the bonds in question".[20]

There follows (23-26), in the opinion, 318 Mich. 9-12, that portion of petitioner's testimony which the circuit judge (one-man grand jury) and his associates concluded was false and evasive. And the court below proceeds to consider, id., p. 13, 'whether, as a matter of fact, plaintiff was guilty of contempt of court'.[21]

The prevailing opinion then holds *as a matter of fact* that the petitioner sought to withhold his real reason, or reasons, for paying money to Mitchell, ostensibly for the bonds; that 'his answers to the questions as to why he had purchased them, and what protection he thought he was receiving through them, were vague and uncertain'; that 'the grand juror and his (two) associates (circuit judges) were fully justified in concluding that Oliver was inten-

[19]

Pin-ball machines, where one who plays them stands to win or lose money, are by the Michigan Supreme Court held to be gambling devices within the meaning of § 302 of the Penal Code, Stat. Ann. § 28.534, *Gibson v. Martin*, 308 Mich. 178; *Oatman v. Port Huron Chief of Police*, 310 Mich. 57.

[20]

The nature of such bonds is more particularly described in the testimony of Oliver, and in the opinions in *Hartley*, *supra*.

[21]

The return of the circuit judge 'must be taken as true', and, it was said, 318 Mich. 13, 'This court does not weigh the testimony but examines it to determine if there is evidence to support the finding'.

tionally evasive'; and that 'his evasive replies clearly tended to obstruct the investigation and were in consequence contemptuous in character'.^[22]

Although four of the eight justices did not agree with the foregoing conclusions of fact, but expressed the opinion (28-32), 318 Mich. at 15-20, that the record did not contain testimony by plaintiff (petitioner) which was evasive or which showed he falsified,^[23] members of the court below did not divide in construing the one-man grand jury law of this State, or in deciding constitutional questions arising therefrom.

6. The prevailing opinion (26), 318 Mich. 12-13, after noting the constitutional questions raised, decides them by reference to the prevailing opinion in the correlated or companion case (*In re Hartley*, 317 Mich. 441), stating that 'the claims made are without merit'.

In the case of *Hartley*, which arose before the same circuit judge acting as a one-man grand jury during the course of the same investigation, the witness urged that his

[22]

'It is scarcely conceivable', continued the Chief Justice, 'that plaintiff did not know the real reason why he took these so-called bonds from Mitchell, and paid money to the latter', and he notes the circuit judges also concluded that Oliver's answers to questions relating to his disposition of the bonds were likewise false and evasive. The circuit judges had the advantage of hearing plaintiff's testimony and of noting his demeanor in giving it. The conclusion reached finds support in the record'.

[23]

Petitioner does not raise this question or issue of fact as such in his original brief; and his counsel contents himself, p. 10, by saying: 'That the testimony was not false upon its face is answered by the fact that four members of the Michigan Supreme Court have so held'. The evasive character of the testimony is ignored throughout petitioner's original brief.

sentence for contempt and subsequent detention were illegal on the same grounds as those urged by the petitioner at bar, contending: (1) due process of law under both the Federal and State Constitutions requires the filing of charges, a notice to the accused and a hearing in all contempt cases not committed in open court; (2) it is a denial of due process of law for a judge summarily to adjudge one guilty of contempt of court upon the basis of alleged false swearing, except where the court has personal knowledge of the falsity of the testimony; and (3) a one-man grand jury does not act as a court; therefore, it is not a direct contempt of court and is not punishable summarily.[24]

The court below held in *Hartley*, (1) that in conducting a one-man grand jury investigation under Michigan law, a circuit judge acts in a judicial capacity; (2) that it had previously upheld the power of a circuit judge, when so acting, to punish summarily for contempt; and (3) that Hartley's contempt, if any, was committed in the face of the court and required no extraneous proofs as to its occurrence.[25]

The contra opinion in *Hartley* (27-29), 317 Mich. 451-454, turned on the question whether one could infer from the testimony 'that Hartley was giving evasive or false answers', which it answered in the negative.

[24]

Cf. counsel's statement, original brief, p. 4, of the 'Questions Presented' in the case at bar, which are practically identical.

[25]

The decision on these three points rested on Michigan authority: *Mundy v. McDonald*, 216 Mich. 44; *People v. Wolfson*, 264 Mich. 400; *In re Cohen*, 295 Mich. 743; and *In re Slattery*, 310 Mich. 458; certiorari denied, 325 U. S. 876.

IV

Questions Presented

With the hope that the foregoing concise statement of the case may have clarified the premise of counsel's argument, we think that the 'Questions Presented' in petitioner's original brief, pp. 4, 8, 10, and 11, should be amended to read as follows:[26]

1. Is it a denial of due process to convict one of contempt of court summarily and without trial when the alleged misconduct ~~is not committed in open court~~ **is committed in the immediate presence of a Michigan circuit judge who, in a judicial capacity,[27] pursuant to the law of that State,[28] is acting as a one-man grand jury in the conduct of an investigation of suspected criminal offenses?**
2. Even assuming a witness has testified in open court **(here, before a circuit judge in chambers)**, is it a denial of due process to convict him of contempt of court summarily and without trial ~~for alleged false testimony, where the falsity of such testimony is not self-evident for giving evasive answers material to an investigation by a Michigan one-man grand jury of suspected criminal offenses, and thus obstructing justice?~~

[26]

In amending the 'Questions Presented', as stated by petitioner's counsel, p. 4, words necessarily deleted are stricken out, while words added are printed in boldface type.

[27]

In re Slattery, 310 Michigan, 458; certiorari denied, 325 U. S. 876.

[28]

Michigan Code of Criminal procedure, chap. 7, § § 3-6, incl., Mich. Comp. Laws 1929 § § 17217-17220; Mich. Stat. Ann. § § 28.943-28.946.

3. Is it a denial of due process summarily to convict one of contempt of court ~~by reason of alleged perjury before a one-man grand jury~~ by reason of alleged evasive testimony before a Michigan circuit judge acting as a one-man grand jury?^[29]

V

Summary of the Argument

First: It is not a denial of due process to convict one of contempt of court summarily when the alleged misconduct is committed in the immediate presence of a Michigan circuit judge who, in a judicial capacity and pursuant to a valid law of that State, is acting as a one-man grand jury in the conduct of an investigation of suspected criminal offenses:

1. The highest court of the State, in upholding the constitutionality of Michigan's one-man grand jury law (footnote 28), and in construing that statute, has repeatedly held that a judge conducting such a proceeding is acting in a judicial capacity.

Mundy v. McDonald, 216 Mich. 444, 20 A.L.R. 398;

People v. Doe, 226 Mich. 5;^[30]

[29]

This third question is a twin of Question 2.

[30]

While in *People v. Doe*, *supra*, the decision of the trial court was upheld by an equally divided court, the question upon which there was a disagreement was not as to the constitutionality of the act or its construction in this respect. In *re Slattery*, *supra*.

People v. Wolfson, 264 Mich. 409;

In re Slattery, 310 Mich. 458, 466-467; certiorari denied, 325 U.S. 876.[31]

2. In apparent recognition of the general rule that Federal courts are bound by the construction placed upon the statute of a State by its highest court,[32] the Circuit Court of Appeals, Sixth District, accepted the foregoing decision and affirmed an order of the District Court denying Slattery relief in habeas corpus proceedings brought by him after he had exhausted his state remedies.

Slattery v. McDonald, Sheriff, 151 F.2d 326; certiorari denied; 326 U.S. 787; rehearing denied, 327 U.S. 814.

3. Counsel is therefore mistaken in the major premise of his argument on this point, and the authorities cited in his brief, pp. 8-10, are distinguishable.

Second: It is not a denial of due process to convict a witness of contempt of court summarily and without trial, for giving evasive answers in the immediate presence of a Michigan circuit judge acting as a one-man grand jury.

[31]

Citing inter alia the following cases wherein the court below affirmed convictions for contempt in one-man grand jury proceedings:

In re Wilkowski, 270 Mich. 678;

In re Watson, 293 Mich. 263;

In re Schnitzer, 295 Mich. 736.

[32]

Chase Securities Corp. v. Donaldson, 325 U.S. 304, 312;

D. & M. Railway Co. v. Fletcher Paper Co., 248 U.S. 30.

1. Section 5 of chapter 7 of the Michigan Code of Criminal Procedure, *supra*, provides inter alia that 'any witness neglecting or refusing to answer any questions which such . . . judge may require . . . shall be deemed guilty of contempt'. And the Supreme Court of the State, upon consideration of the foregoing language, has held it to be an obstruction of justice punishable summarily as a direct contempt in *facie curiae*, for such a witness to refuse to tell what he knows, whether the refusal is absolute or by the substitute of evasive answers, *In re Slattery, supra*, and cases cited.
2. The Michigan doctrine exemplified in *Slattery, supra*, harmonizes closely with a rule recognized by this Court as applicable to a direct, *obstructive* contempt in *facie curiae*.

Ex Parte Hudgings, 249 U.S. 378,
11 A.L.R. 333; [33]

Clark v. United States, 289 U.S. 1;
In re Michael, 326 U.S. 224, [34]

the classic definition of which (so apt at bar) is found in the expressive language of Judge Learned Hand,

United States v. Appel, 211 F. 495, 496.

[33]

In the Annotation which follows the *Hudgings* case, 11 A.L.R. at 342, on the subject 'Perjury or false swearing as contempt', it is said that 'cases dealing with evasive answers, which might be classed as the equivalent of a refusal to testify are beyond the scope of the note'.

[34]

When considering these cases the Court will of course bear in mind that it is reviewing an order of a State court unlimited in power by the Act of Congress referred to in *Nye v. United States*, 313 U.S. 33, 44-48, which in turn is cited in *Michael, supra*.

3. Federal courts in general recognize the rule that 'testimony which is obviously false or *evasive* is equivalent to a refusal to testify, and punishable as contempt, assuming that a refusal to testify would be', [35] especially in contempt cases growing out of the Bankruptcy Act of July 1, 1898. [36] E.g., from among many others,

In re Schulman, 177 F. 191;

In re Eskay, 38 F. Supp. 221; affirmed,
122 F. 2d 819.

Third: The third question is covered by the second; except it should be added, perhaps, that the question as presented by petitioner contains an erroneous premise. Petitioner was not convicted of contempt because he committed perjury, but because, in one respect, his testimony which was *prima facie* contradictory, obstructed the grand jury investigation.

[35]

Quoted from note in 41 L.R.A. (N.S.) 478, reporting *Creasy v. Hall*, 243 No. 679; 148 S.W. 914.

[36]

Act of July 1, 1898, c. 541, § 41; 30 Stat. 556; June 22, 1938, c. 575, § 1; 52 Stat. 859; Title 11 U.S.C. § 69 a. See notes to decisions, 3 FCA, Title 11, s. 69, a (4), 302; and Book I, FCA 10-Year Cum. Supp., at p. 134.

VI

The Argument

Point One

Petitioner was not denied due process of law when summarily convicted of contempt before a judge acting in chambers as a one-man grand jury.

Stating our position specifically, William Oliver was not denied due process when summarily convicted of contempt of court in the presence of a circuit judge in chambers who, under authority of a Michigan statute, Code of Criminal Procedure, chap. 7, §§ 3-6, as construed by the State's highest court, *In re Slattery*, 310 Mich. 458, was acting in his judicial capacity as a 'one-man grand jury' investigating suspected criminal offenses within his jurisdiction.

Petitioner's counsel thus poses the first question:

"1. Is it a denial of due process to convict one of contempt of court summarily and without trial when the alleged misconduct is not committed in open court?" (petition, p. 4; argued, pp. 8-10).

The obvious though superficial answer securely wrapped in the question so stated, is that due process *would* be denied in such circumstances, for no informed person would assert that a constructive contempt committed entirely outside the precincts of a court may be punished summarily without notice or hearing.

The fault, however, lies in the premise; for while the alleged misconduct of William Oliver was not committed in a court room during the progress of a formal trial, the

offense did occur in the immediate presence of a judge who was then acting in a judicial capacity.

1. As noted in our summary of the argument, the Michigan Supreme Court, in construing the 'one-man grand jury law' (so often cited in this brief), is neither a prosecuting attorney, policeman or detective, but is acting in a judicial capacity, *In re Slattery, supra*.

In *Slattery*, counsel at bar who represented the petitioner there, assailed the constitutionality of the one-man grand jury statutes, claiming that they impose non-judicial duties on a judge, and 'that one cannot be held in contempt if he testifies before a non-judicial body'. Because of the importance of the question, the Michigan court 're-examined it with extreme care' and after reviewing many of its former decisions on the subject, said:

"So that there may be no further question, we hold that the judge conducting a one-man grand jury proceeding is acting in a judicial capacity" (310 Mich. 466-467).

And the court also observes, 310 Mich. 478, there is 'no more important (judicial) duty than to sit as a one-man grand jury called to uncover criminal malfeasance in office'.

2. After this Court had denied him a writ of certiorari, 325 U.S. 876, *Slattery* applied for a writ of habeas corpus from the District Court of the United States for the Eastern District of Michigan, and from an order dismissing the writ after a due-course hearing, he appealed to the Circuit Court of Appeals, Sixth Circuit, which affirmed,

Slattery v. MacDonald, 151 F. 2d 326; writ of certiorari denied, 326 U.S. 787; rehearing denied, 327 U.S. 814.

The Circuit Court said, among other things:

“The highest Court of the State held that the fact that the judge of the state circuit court was functioning as a one-man grand jury, pursuant to Michigan statutes, at the time the contempt was committed did not divest him of his judicial capacity; and it was pointed out that the Supreme Court of Michigan had in many other cases affirmed convictions for contempt in one-man grand jury proceedings similar to the instant case”.

3. Counsel argues, p. 8, that ‘in the instant case there was no refusal to appeal (appear) nor a refusal to answer questions’ (citing § 5 of chapter 7 of the Code of Criminal Procedure, *supra*); therefore, it is urged, the circuit judge who acted as a one-man grand jury ‘had to invoke his contempt powers as a circuit judge’ as regulated in Michigan by The Judicature Act, Chap. 5, § 1 et seq., esp., §§ 1 and 2, Comp. Laws 1929, §§ 13910, 13911, Stat. Ann. §§ 27.511, 27.512.

The first section cited above, provides *in part*:

“Section 1. Every court of record shall have power to punish by fine or imprisonment or both, persons guilty of any neglect or violation of duty or misconduct, in the following cases, *and no others*: [37]

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority;

[37]

The italics are supplied by petitioner's counsel in his Appendix A, p. 13, which suggests a question not necessary to decision: whether the legislature of Michigan may so strangle the inherent power of a constitutional state court.

2. Any breach of the peace, noise or disturbance, directly tending to interrupt its proceedings;" (Comp. Laws 1929, § 13910, Stat. Ann. § 28.511).

The foregoing quotation is as far as counsel goes in his original brief, pp. 8, 9, and 13, and not realizing its importance he quite inadvertently omits the 7th subdivision of § 1, *supra*, which reads:

"7. All persons summoned as witnesses for refusal or neglect to obey such summons, or to attend or to be sworn, or when so sworn to answer any legal and proper interrogatory" [38]

The second section cited above, provides:

"Sec. 2. When any misconduct, punishable by fine and imprisonment as declared in the last section, shall be committed in the immediate view and presence of the court, it may be punished summarily, by fine or imprisonment, or both, as hereinafter prescribed" Comp. Laws 1929, § 13911, Stat. Ann. § 28.512).

Section 3 of chapter 5 of the Judicature Act, *supra*, Comp. Laws 1929, § 13912, Stat. Ann. § 28.513, then provides the procedure for punishing contempts 'not in the presence of the court'.

Counsel urges that § 3, *supra*, applies to this case, since the contempt was not committed in the presence of the court, but in so construing these sections of the Judicature Act

[38]

Please compare this language with that of § 5 of chapter 7 of the Michigan Code of Criminal Procedure, Comp. Laws 1929, § 17219, Stat. Ann. § 28.945, under which the petitioner in the pending cause was convicted summarily.

of Michigan, he forgets that the Supreme Court of that State disagreed with him. In *Hartley*, 317 Mich. 444-445, which in respect to statutory construction and application controlled *Oliver*, 318 Mich. 13, the court held that the circuit judge, 'while acting as a one-man grand jury, may, in appropriate cases, summarily adjudge a witness testifying before him guilty of contempt and impose sentence forthwith', and that *Hartley's* contempt, if any, was committed in the face of the court and required no extraneous proofs as to its occurrence. It was direct and there was, therefore, no necessity for filing of charges, notice to accused and hearing as provided by section 3 of chapter 5 of the Michigan Judicature Act, *supra*. It was, the court held, properly dealt with summarily under the authority of §§ 1 and 2 of that chapter (citing 3 Comp. Laws 1929, §§ 13910, 13911 [Stat. Ann. §§ 27.511, 27.512]).

The court in so holding, be it again noted, did not disagree on these questions of statutory application or construction, but divided only on the issue whether the petitioners *Hartley* and *Oliver* were 'in fact, guilty of contempt', 317 Mich. 445, a question not raised in petitioner's original brief.

4. The cases cited by counsel, pp. 9, 10,

Re Savin, 131 U.S. 267;

Cooke v. United States, 267 U.S. 517;

In re Michael, 326 U.S. 224,

are distinguishable because in each instance this Court was construing Federal statutes which were enacted by the Congress for the express purpose of curtailing the powers of the courts of the United States to punish for contempt, *Nye v. United States*, 313 U.S. 33, 44-48, *In re Michael supra*, at 227.

In the Michigan enactments construed by the Michigan court the words 'in open court' do not occur. Subdivision 1 of § 1 of chap. 5 of the Judicature Act, *supra*, does contain the phrase 'during its sitting', but this refers to disorderly acts committed doubtless 'in open court'.

On the other hand, subdivision 7 of § 1 *supra*, which authorizes punishment for witnesses, does not limit its provisions to witnesses who attend in open court.

And § 2 thereof, *supra*, refers to 'the immediate view and presence of the court'. As this Court observed long ago, in *Savin, Petitioner, supra*, at 277,

"It was held in *Heard v. Pierce*, 8 Cush. 338, 341, that 'the grand jury, like the petit jury, is an appendage of the court, acting under the authority of the court, and the witnesses summoned before them are amenable to the court, precisely as the witnesses testifying before the petit jury are amenable to the court'. Bacon, in his essay on Judicature (No. LVI), says: 'The place of justice is an hallowed place; and therefore not only the bench, but the footpace and precincts and purprise thereof ought to be preserved against scandal and corruption'. We are of opinion that, within the meaning of the statute, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court. It is true that the mode of proceeding for contempt is not the same in every case of such misbehavior. Where the contempt is committed directly under the eye or within the view of the court, it may proceed 'upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form', *Ex Parte Terry*, 128 U.S. 389, 309" . . .

This principle, we respectfully submit, applies with equal force to a circuit judge of Michigan sitting in chambers, acting in a judicial capacity, examining witnesses to elicit the truth relating to suspected criminal offenses, and acting as a one-man grand jury by virtue of the authority of Michigan law. We respectfully submit, therefore, that petitioner was not denied due process of law when summarily convicted of contempt.

Point Two

It is not a denial of due process to convict a witness of contempt of court summarily and without trial, for giving evasive answers to pertinent questions in the immediate presence of a Michigan circuit judge acting as a one-man grand jury.

Again we find an erroneous premise in the question as propounded by counsel, p. 4, as argued p. 10:

“2. Even assuming a witness has testified in open court, is it a denial of due process to convict him of contempt summarily and without trial for alleged false testimony, where the falsity of such testimony is not self-evident?”

Certainly, it is a denial of due process so to do; but where the falsity is self-evident, or where the testimony is evasive, that is quite another matter. And counsel frankly recognizes the first exception, and he is quite correct in saying: ‘But where evidence is required to establish the falsity of testimony then due process requires a notice and a hearing on the question of the falsity of the testimony’ (citing numerous authorities).

1. The Michigan Supreme Court in *Slattery, supra*, finding that the grand jury witness had given false or evasive answers to questions, evading answers by subterfuge, relied strongly on the rule so clearly stated by Judge Learned Hand nearly 35 years ago in an opinion which time after time has received the approval and recognition of this Court,

United States v. Appel (June 1913), sometimes cited
In re Appel, 211 F. 495.

Judge Hand said:

"The rule, I think, ought to be this: If a witness' conduct shows beyond any doubt whatever that he is refusing to tell what he knows, he is in contempt of court. That conduct is, of course, beyond question when he flatly refuses to answer, but it may appear in other ways. A court, like anyone else who is in earnest, ought not to be put off by transparent sham, and the mere fact that the witness gives some answer cannot be an absolute test. . . . If a court is to have any power at all to compel an answer, it must surely have power to compel an answer which is not given to fob off inquiry".

And in such reliance, the Michigan court had this to say in part, 310 Mich. 476:

"The refusal to answer or the giving of an evasive reply obstructs the work of a judge or jury which, in an orderly manner, is seeking to ascertain whether a complaint is true and certain crimes have been committed. If the witness could hide behind the answer 'don't remember' or words to that effect, when such statement was manifestly untrue, it would emasculate

the one-man grand-jury proceedings and make them of little or no value”.

See, also, *O'Connell v. United States*, 40 F. 2d 201, and the cases therein cited,^[39] holding that notwithstanding a witness makes formal answer, withholding truth may constitute obstruction of justice punishable as contempt, although also constituting perjury.

3. The principles enunciated by Judge Learned Hand in *Appel, supra*, have been recognized by the Court in several cases cited by petitioner's counsel,

Ex Parte Hudgings, 249 U.S. 378, 11 A.L.R. 333;
Clark v. United States, 289 U.S.1;

and

In re Michael, 326 U.S. 224,

as an exception to the general rule that perjury or false testimony of itself does not constitute contempt.

In the case of *Hudgings, supra*, upon which petitioner so strongly relies to sustain his position, it was held that perjury *in facie curiae* is not of itself punishable as contempt of a federal court apart from its obstructive tendency, p. 383; hence, a *District Court* has no power to adjudge a witness guilty of contempt solely because in the court's opinion he is wilfully refusing to testify truthfully, and to confine him until he shall purge himself by giving testimony which the court deems truthful, p. 384. But the Court, p. 382, recognized that ‘because perjury is a crime

[39]

Loubriel v. United States, 9 F. 2d 807; *In re Schulman*, 177 F. 191; *In re Kaplan Bros.*, 213 F. 753, and others, cited in 40 F. 2d at 204-205.

defined by law . . . does not necessarily establish that when committed in the presence of a court it may not, when exceptional conditions so justify, be the subject-matter of a punishment for contempt', citing as an example, among others, *United States v. Appel, supra*.

In the *Clark case*, 289 U.S. 11-12, the exception is again pointed out:

"The books propound the question whether perjury is contempt, and answer it with nice distinctions. Perjury by a witness has been thought to be not enough where the obstruction to judicial power is only that inherent in the wrong of testifying falsely. *Ex Parte Hudgings, supra*. For offenses of that order the remedy by indictment is appropriate and adequate. On the other hand, obstruction to judicial power will not lose the quality of contempt though one of its aggravations be the commission of perjury. Cf. (*inter alia*) *United States v. Appel*, 211 Fed. 495".

And while the Court *In re Michael*, 326 U.S. 324, held that a witness may not be punished for contempt under § 268 of the Judicial Code for perjury alone, Mr. Justice Black said, pp. 228-229:

"Here there was, at best, no element except perjury 'clearly shown'. Nor need we consider cases like *United States v. Appel*, 211 F. 495, 496, pressed upon us by the government. For there the Court thought that the testimony of Appel was 'on its mere face, and without inquiry collaterally, . . . not a bona fide effort to answer the questions at all'. In the instant case there was collateral inquiry; the testimony of other witnesses was invoked to convince the trial judge that petitioner was a perjurer. . . . This was the equivalent

of saying that for perjury alone a witness may be punished for contempt. Sec. 268 is not an attempt to grant such power''.

We also invite attention to the bankruptcy court contempt cases cited in this division of our summary of the argument, as affording an analogy.

4. It is important in this connection to note, as did Mr. Justice Black for the Court in *Michael*, 326 U.S. 227, that § 268 of the Judicial Code, when considered in the light of the Act of 1831, 4 Stat. 487, limits the power to punish contempts to misbehavior which obstructs the administration of justice. 'The exercise by federal courts', Mr. Justice Black continues, 'of any broader contempt power than this would permit too great inroads on the procedural safeguards of the Bill of Rights, since contempts are summary in their nature, and leave determination of guilt to a judge rather than a jury'.

No such congressional limitation restrains exertion of state judicial power to punish for contempt; hence, in the instant case this Court has no occasion to apply the terms prescribed by § 268 of the Judicial Code; and, in the absence of violation of the due process clause of the Fourteenth Amendment, the inherent authority of a state court in contempt proceedings is curbed only by the Constitution of the State, or by acts of the state legislature.^[40]

But even though the yardstick supplied by § 268 of the Judicial Code could be used to measure the power of a

[40]

It is interesting, if not important, to note the few occasions on which this Court has been called upon to review a state adjudication of contempt of court. See: Vol. 5, United States Supreme Court Digest, Constitutional Law, § 273, Contempt.

Michigan circuit judge, no usurpation of judicial power (and the question in this case is strictly one of power) would be revealed if the answers of a one-man grand-jury witness were evasive, and if such witness were shown to have intentionally evaded replies to material questions propounded, thereby in effect refusing to answer, for clearly in such circumstances his course of conduct would amount to an obstruction of justice.

We, therefore, respectfully submit it was not a denial of due process to convict this witness (Oliver) of contempt of court summarily and without trial, for giving evasive answers.

The third question presented by petitioner's counsel, p. 4, whether it is a denial of due process summarily to convict one of contempt by reason of alleged perjury before a one-man grand jury, or, as we have rephrased it, by reason of evasive answers, has been answered in considering the second; and it requires no further discussion.

VII

Conclusion

We, therefore, respectfully submit that the judgment of the court below should be affirmed.

Respectfully Submitted,

Eugene F. Black
Attorney General of the
State of Michigan

Edmund E. Shepherd
Solicitor General of the
State of Michigan

H. H. Warner
Daniel J. O'Hara
Assistants Attorney General

Counsel for Respondent
State of Michigan